



LAW COMMISSION OF INDIA

ONE HUNDRED AND EIGHTH

REPORT

ON

PROMISSORY ESTOPPEL

GOVERNMENT OF INDIA
Ministry of Law, Justice and Company Affairs

JUSTICE K. K. MATHEW

D.O. No. F. 2(2)/84—LC

NEW DELHI,

Dated, the 12th December, 1984.

My dear Minister,

I am forwarding herewith the One Hundred and Eighth Report of the Law Commission on "PROMISSORY ESTOPPEL". The subject was taken up by the Law Commission on its own.

The Commission is indebted to Shri Vepa. P. Sarathi, Part-Time Member, and Shri A. K. Srinivasamurthy, Member-Secretary, for their valuable assistance in the preparation of the Report.

With regards,

Yours sincerely,

(Sd.)

K. K. MATHEW

Shri Jagannath Kaushal.
Hon'ble Minister of Law & Justice.
NEW DELHI.
Encl : 108th Report.

CONTENTS

	PAGE
CHAPTER 1 — Introduction—Consideration & Promissory Estoppel	1
CHAPTER 2 — Evolution of the Doctrine in India.	2
CHAPTER 3 — The Law in the United Kingdom and the United States.	18
CHAPTER 4 — The Problems.	19
CHAPTER 5 — Comments Received.	20
CHAPTER 6 — Recommendations.	21

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<u>Line</u>	<u>Para</u>	<u>Page</u>	<u>For</u>	<u>Read</u>
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5	2.12	8	Lorls	Lords
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19	2.17(v)	14	it is enjoined by law'	'it is 'enjoined by law'
4	2.17(v)	15	judgment	judgments
4	2.17(vi)	15	case	case ¹
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5	2.17	17	light	term
2	2.18(1)	18	-cise the legislative	-ise of the legislative.
4	2.18(3)	18	acts its officers	acts of its officers
2	2.18(4)	18	enters an	enters into an
11	2.18(4)	18	hise	his
10	3.1	18	defference	difference
18	4.1	19	a sa	as a
8	4.1	20	or promises	or the promises
15	4.1	20	power	powers
15	4.1	20	representations	representation
22	6.2	21	could	would

PROMISSORY ESTOPPEL

CHAPTER 1

INTRODUCTION—CONSIDERATION & PROMISSORY ESTOPPEL

1.1. Under s. 2(h) of the Indian Contract Act, 1872, a 'contract' is an agreement enforceable by law. Under s. 2(e), every promise is an agreement. But, unless the agreement is supported by 'consideration', the agreement would be void except in the three instances mentioned in s. 25. Therefore, unless a promise is supported by 'consideration' it will not, ordinarily, be enforceable by law. Section 2(d) defines 'consideration' as follows:—

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do, or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

Hence, when a person makes a promise, unless the promisee does, has done or promises to do something, *at the desire of the promisor*, the promise would be without consideration and the promise cannot be enforced in a court of law.

1.2. Suppose a person promises a subscription to a charitable institution with the knowledge that a building will be constructed with the money received from the subscribers, but does not desire the institution to do so; the institution however, on the faith of the promise, incurs expenditure in putting up a structure. If the promisor does not honour his promise, the institution may not be able to sue him successfully for the amount promised, because, the promise is not supported by consideration.

Take the case of the Government making an announcement relating to some relief such as a sales-tax holiday if something is done by the citizen such as opening a new factory in a specified area. On the faith of the announcement, a citizen may do the necessary thing and thus change his position. The Government thereafter changes its policy. Even if it is assumed that the citizen acted at the desire of the Government there cannot be a contract enforceable against the Government, because, contracts, which can be enforced against the Government, should be in a particular form.¹

On the question whether the person promising the subscription to the institution or the Government, in the second example, could be held to the promise and representation respectively, that is, whether the court could compel them to honour their representation, one view is that the court could do so on the basis of the doctrine of Promissory Estoppel. The doctrine has been expressed by a Bench of two Judges of the Supreme Court of India² as follows:—

"Where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect, a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it

¹Art. 299 of the Constitution of India.

² *MP Sugar Mills v. State of U.P.*, A.I.R. 1979 S.C. 621 (Bhagwati and Tulzapurkar JJ).

would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not."¹

Necessity
for the
examination
of the
doctrine.

1.3. Apart from the fact that the above decision, holding that the doctrine can be invoked against the Government in all cases, has been expressly dissented from by another Bench of two Judges of the Supreme Court,² there are observations in the first case which are contrary to the views expressed in earlier larger Benches of the Supreme Court and to the law in the U.K. and the U.S. from which the countries inspiration has been drawn for propounding the doctrine.

The law, thus being in a state of uncertainty, the Law Commission has, *suo motu*, undertaken a study of the doctrine in order to define precisely its scope and ambit.

CHAPTER 2

EVOLUTION OF THE DOCTRINE IN INDIA

Necessity
for a
historical
retrospect.

2.1. In order to understand the precise scope of the doctrine of promissory estoppel, it is necessary to trace its evolution in our country. Such a study will help one to understand the judicial process by which the doctrine has been enlarged or contracted and to formulate a precise rule.

Ganges
Manufacturing Co.
v. Souhji Mill.

2.2 In this case,³ C contracted to buy a certain number of gunny bags from the appellant, and 107,500 bags remain undelivered as C was unable to pay for them. When C represented that arrangements had been made for the payment for 87,500 bags, delivery orders were given to C for delivery against payment. C's representative took a letter from C to the appellant requesting the appellant to direct delivery of the bags to the representative of the respondent who went along with C's representative. The officer in charge of the appellant did so. The reason was that the respondent had agreed to advance the necessary money to C. The appellant delivered 50,000 bags to the representative of the respondent but refused to deliver the rest, because, C had failed to pay the price. Thereupon, the respondent sued the appellant for delivery of the remaining bags alleging that they had advanced the money to C on the appellant's representation that the goods will be delivered. The High Court decreed that suit holding that as the delivery in favour of the respondent had been assented to by the appellant, the appellant was estopped from denying that the appellant held the goods, answering to the description in the delivery orders, at the disposal of the person to whom the orders were given, that is, the representative of the respondent. In answer to the contention that no estoppel could arise in the case, because, s. 155, Evidence Act, was not applicable, the Court observed:⁴

'Estoppels' in the sense in which the term is used in English legal phraseology, are matter of infinite variety, and are by no means confined to subjects which are dealt with in Chapter VIII of the Evidence Act. A man may be estopped not only from giving particular evidence, but from doing acts, or relying upon any particular arguments of contention which the rules of equity and good conscience prevent him from using as against his opponent.

¹M.P. Sugar Mills v. State of U.P., A.I.R. 1979 SC. 621, P. 631.

²M/s Jit Ram Shiv Kumar v. State of Haryana, A.I.R. 1980 SC. 1283. (Murtaza Fazal Ali and Kailasam JJ).

³(1880) ILR 5 Cal. 669.

⁴(1880) ILR 5 Cal. 669 at P. 678.

EVOLUTION OF THE DOCTRINE IN INDIA

The law relating to estoppel, as stated above, appears to be too widely stated in the following observation of the Supreme Court:¹

We doubt whether the Court while determining whether the conduct of a particular person amounts to an estoppel, could travel beyond the provisions of s. 115 of the Evidence Act and rely upon what is sometimes called 'equitable estoppel'.

But assuming that the law, as stated by the Calcutta High Court, is correct, the point to be noted is that it was a case between private parties.

2.3. The facts in this case² are : The appellant's predecessor was a lessee from the Government of certain revenue yielding lands. He constructed a canal which passed through Government lands spending more than Rs. 8 lakhs. Government permitted the construction, because, considerable area of land would be rendered fit for cultivation and there would be an increase in Government revenue. The canal also passed through the lands of private parties who also agreed to the construction on certain terms as to compensation. After the period of the current settlement had expired the Government gave by way of Inam, a large tract of land to the appellant's predecessor in recognition of his loyalty and good service. One of the terms of the grant was that the Government could take over the management of the canal for better administration. Government, however, passed orders taking over permanently the canal lands, and denied any proprietary right in the appellant to the canal lands. The Privy Council held.³

Ahmed Yar
Khan v.
Secretary
of State.

Taking all the circumstances into consideration, having regard to the permanent character of the proposed work, the indefinite amount of the probable expense of construction and the fact that the Government encouraged the undertakers to acquire the necessary land where the line of the canal passed through property in private ownership, and also bearing in mind the view of the Government at the time, as appears from Government records, that the work might be constructed and maintained more economically by the Khans than by Government, and that it would be better to leave the settlement of the country in the hands of native Chiefs, it seems to be pretty clear that the Government must have intended the Khans to undersand, and in fact must have led them to expect, that the Government land required for the canal would be made over to them in proprietary right. If the Government had intended that at the termination of the period of the then current settlement the Government land required and used for the canal should revert to the Government, it is difficult to suppose that the Government would have omitted to say "so... or to make a provision for securing the transfer to them of the land acquired by the undertakers from private owners.

For arriving at this conclusion the Privy Council relied on the following rule laid down in *Ramsden v. Dyson*:⁴

If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.

¹*Maddnappa v. Chandramma*, A.I.R. 1965 S.C. 1812.

²(1901) 28 IA 211.

³*Ibid* P. 218.

⁴(1866) LR 1 HL 129, 170.

REPORT ON PROMISSORY ESTOPPEL

The Privy Council also held¹ that, upon the expiration of the period of the settlement for which the lease of the bar-barini lands had been granted, Government made a grant to the appellant's predecessor at a moderate assessment of a tract of land in full proprietary right and in the deed of settlement, Government stipulated that they had the right when necessary in the management of the canal. This however did not give the Government a right to seize and confiscate the canal.

On the facts of the case, the appellant, under the Transfer of Property Act, 1882, would be entitled to a perpetual lease of the canal lands from the Government. But, perhaps, because the Act was not in force at the time of the transaction, Lord Macnaghten applied the *Ramsden* rule to give relief to the appellant. But the rule is the rule of Proprietary Estoppel and not of Promissory Estoppel. And Proprietary Estoppel had always a special status in the English Law.

2.4. In this case,² the appellant surrendered its own lands in favour of the Government in consideration of a lease of government lands in favour of the appellant on a nominal rent. After taking possession, the appellant spent enormous sums in making constructions. Twenty seven years later, the respondent filed a suit claiming a large amount as arrears of rent and for a declaration that the lease, if any, was determined. The High Court modified the decree of the trial court in favour of the respondent. The High Court allowed the parties to redefine their rights, namely, the appellant's right to a leasehold and the respondent's right to a reasonable rent. In the course of the judgment, Sir Lawrence Jenkins CJ referred to the *Ramsden* rule and observed that the 'Crown comes within the range of this equity'.

A perusal of the judgment, however, shows that the learned Chief Justice did not give any relief to the appellant by applying the rule.

The learned Chief Justice noted that the parties were the Municipality and the Government, both interested in public welfare, and that the controversy between them should not be allowed to become 'acute', and that the suit was really not for eviction of the appellant but was only for rent and for ascertaining the right of the parties. In fact, the decree of the High Court was that the Municipality should hold the land on an agreed rent and that if the Municipality did not cooperate, there would be a decree for eviction in favour of the respondent.

This judgment can, by no stretch of imagination, be understood as applying even the rule of proprietary estoppel let alone the doctrine of promissory estoppel.

2.5. The facts which gave rise to this case,³ were that in 1865 the Government of Bombay called upon the predecessor in title of the Municipal Corporation of Bombay to remove old markets from a certain site and vacate it and on the application of the Municipal Commissioner the Government passed a resolution approving and authorising the grant of another site to the Municipality. The Municipal Corporation gave up the site on which the old markets were situated and spent a sum of Rs. 17 lakhs in erecting and maintaining markets on the new site. In 1940 the Collector of Bombay assessed the new site to land revenue and the Municipal Corporation thereupon filed a suit for a declaration that it was entitled to hold the land for ever without payment of any assessment. The majority of the Judges of the Supreme Court held that the

¹(1901) 28 IA 211, pp. 219, 220.

²(1905) ILR 29 Bom. 580.

³AIR 1951 SC 469.

EVOLUTION OF THE DOCTRINE IN INDIA

Government was not, under the circumstances of the case, entitled to assess land revenue because the Municipal Corporation had taken possession of the land in terms of the Government resolution and has continued in such possession openly, uninterruptedly, and of right for over seventy years and thereby acquired the limited title it had been prescribing for during the period, that is to say, the right to hold the land in perpetuity free of rent. Only Chandrasekhara Iyer J. while concurring with the majority, rested his decision on promissory estoppel that the Government could not be allowed to go back on its representation. He seems to have misunderstood the reference to the *Ramsden* rule in the earlier case. He evidently thought that if in the earlier case, the *Ramsden* rule was applied it could be applied with greater force in the latter case. In doing so, he mistakenly called it 'promissory estoppel.'

2.6. In this case¹ the Government of India promulgated an Export Promotion Scheme for providing incentives to exporters of woollen goods. The respondent exported goods of a certain value and claimed import entitlement equal to the full value of exports as notified in the scheme, but the Textile Commissioner reduced the import entitlement. The Supreme Court held in favour of the respondent on the ground that the Textile Commissioner and the Union of India did not act in exercise of the power under cl. 10 of the scheme under which the Textile Commissioner may assess the value of the goods exported and issue an entitlement certificate on the basis of such assessed value, and that on the contrary, the Textile Commissioner reduced the import entitlement without giving an adequate opportunity to the respondent to present its case. The Court also observed:

We hold that the claim of the respondent is appropriately founded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme, and the action taken by the respondent acting upon that representation under the belief that the Government would carry out the representation made by it.

Having held in favour of the respondent on the ground that the provisions of the Scheme had not been followed by the appellants, any reference to promissory estoppel for using against the Government was totally uncalled for and the observation must be treated as *obiter* pure and simple.

2.7. The facts of this case² are: In 1956 the appellant set up its factory in an industrial area. At that time no octroi was payable with respect to the goods imported into the industrial area. In 1960, Government constituted a municipality which included the industrial area. In 1962, the Government agreed to exclude the area but the District Municipality objected, agreeing however, to exempt the existing factories from payment of octroi for 7 years. In the 1965 the Dt. Municipality became the Ulhasnagar Municipality which decided to levy octroi duty in 1968, and the appellant objected. Holding in favour of the appellant, the Supreme Court held:

There is undoubtedly a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon the representation. A representation that

¹AIR 1968 SC 718.

²A.I.R. 1971 S.C. 1021.

REPORT ON PROMISSORY ESTOPPEL

something will be done in the future may result in a contract, if another person to whom it is addressed acts upon it. A representation that something will be done in future is not a representation that it is true when made. But between a representation of a fact which is untrue and a representation, express or implied—to do something in future, there is no clear antithesis. A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law; if the statute requires that the agreement shall be in a certain form, no contract may result from the representation and acting thereon but the law is not powerless to raise in appropriate cases an equity against him to compel performance of the obligation arising out of his representation.

Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have not altered their position to their prejudice. The obligation against an individual out of his representation amounting to a promise may be enforced *ex contractu* by a person who acts upon the promise: when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by the statute, the obligation, if the contract be not in that form may be enforced against it in appropriate cases in equity.

The Court also observed:

If our nascent democracy is to thrive, different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.

Three points have to be noted with respect to this case. First, the application of the principle of promissory estoppel in this case is obviously wrong. All the learned Judges who had referred to this principle, including Bhagwati and Tulzapurkar JJ., are agreed that there can be no promissory estoppel against the legislative power. Taxation, whether by the legislature or its delegate, is an exercise of the legislative power and octroi is nothing but tax. Secondly the reference to a 'nascent democracy' by Shah J. is again unfortunate. A democracy in a developing country cannot be ineffective and the Government or a municipality, which is only an extension of the government, can be effective only if they are free to formulate and reformulate their policies and augment their revenues. Thirdly, there is absolutely no equity in favour of the appellant. When the industrial area was included in the municipality, octroi became automatically payable with respect to the goods imported into the area. It was only by way of concession that the municipality agreed to exempt. If later on the concession was withdrawn, no grievance can be made of it. It is not as if the appellant was invited into the area with a promise of favourable treatment.

2.8. In this case, the appellant was the highest bidder at an auction for dealing in liquor. He alleged that at the time of the auction, the Dy. Commissioner announced that no Sales-Tax would be liable to be paid on the sales of liquor, but despite the announcement (assurance) Government has levied and was taking steps to levy sales-tax on such sales. The Court held:

EVOLUTION OF THE DOCTRINE IN INDIA

The power to impose a tax is undoubtedly a legislative power. That power can be exercised by the legislature directly or, subject to certain conditions, the legislature may delegate the power to some other authority. But the exercise of that power, whether by the legislature or by its delegate is an exercise of a legislative power ... Unless the executive is specifically empowered by law to give an exemption, it cannot say that it will not enforce the law as against a particular person. No court can give a direction to a Government to refrain from enforcing a provision of law.

Referring to the Bombay Corporation case, the Court incidently observed that it was case of relationship between landlord and tenant.

2.9. In this case,¹ the respondent was a 100% shareholder of the appellant. The appellant undertook to discharge the income-tax liability of the respondent and kept back dividends due on respondent's shares for being utilized as working capital. The appellant in fact paid the income-tax assessed on the respondent. While the appellant was keeping the respondent informed of the various steps it was taking and collecting any refunds ordered and keeping them, at no time did it make any demand on the respondent to re-imburse the tax paid. When the respondent transferred its shares, the appellant sued respondent for the amount of tax liability discharged by it and claimed a lien on the respondent's shares. The respondent pleaded as one of its defences, that the appellant was estopped. The Court, upholding the plea of promissory estoppel, observed:

Turner Morrison & Co. v. Hungerford Investment Trust Ltd.

Estoppel is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel i.e. promissory estoppel has come to be recognised by courts in this country, as well as in England. The full implication of 'promissory estoppel' is yet to be spelled out ... The principle stated in the High Trees case² is that, when one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the assurance or promise cannot afterwards be allowed to revert to the previous relationship as if no such promise or assurance has been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word. But that principle does not create any cause of action which did not exist before so that, where a promise is made which is not supported by consideration, the promisee cannot bring an action on the basis of the promise.... The rule laid down in these decisions undoubtedly advances the cause of justice and hence we have no hesitation in accepting it.

This case, it may be noted is between parties.

2.10. In this case,³ the Commisisoner HR&CE sanctioned the leasing of Dewaswom land to the petitioner and a lease was executed for 99 years. The petitioner was given a permit for clear felling with respect to a part of the land. But the Government, under s. 99, HR&CE Act, cancelled the sanction of the lease. One of the contentions raised by petitioner was that by the permit for clear-felling there was a representation by the Government that the sanction was valid, that the petitioner acted on the representation to his detriment by investing large amounts for developing the property. The High Court however held:

¹A.I.R. 1972 S.C. 1311.

²1947—(1) K.B. 130.

³AIR 1972 Ker. 39.

REPORT ON PROMISSORY ESTOPPEL

The Government was not estopped from exercising its statutory power under s. 99, first for the reason that there was no representation by the Government that the sanction for the lease was valid—the grant of a clear-felling permit under the MPPF Act by no means implied that the lease granted by the Devaswom is valid; secondly, because the petitioner did not act to his detriment on the faith of the representation; and thirdly, because the power under s. 99, is one conferred on the Government to be exercised for the public good or at any rate for the benefit of persons other than the Government.

Referring to the *Anglo Afghan* and *Ulhasnagar* cases, the High Court observed:

These cases have no application to the facts of this case as they did not consider or decide the result of an impact of a representation on a discretionary statutory power to be exercised for the public good or for the benefit of a person other than the person or body exercising the power ... There cannot be an estoppel in respect of the exercise of a discretionary statutory power which is to be exercised for the public good or for the benefit of some one other than the person against whom the estoppel is asserted.

2.11. The validity of the Kerala Private Forests (Vesting and Assignment) Act, 1971, was challenged in this case¹ by owners or lessees of large tracts of forest lands. One of the contentions was that the respondent Company established itself in Kerala for production of rayon cloth pulp from raw material supplied by Government, that the Government was unable to supply the raw material and by an agreement undertook not to legislate for the acquisition of private forests for a period of 60 years if the company purchased forest lands for the supply of raw materials, that the respondent did purchase a large tract and therefore, the agreement not to legislate should operate as equitable estoppel against the Government. The Court held:

We do not see how an agreement of the Government can preclude legislation on the subject. The High Court has rightly pointed out that the surrender by the Government of its legislative powers to be used for public cannot avail the company or operate against the Government as equitable estoppel.

2.12. The respondent, before purchasing a certain property, was informed by the Asstt. Custodian that the property was not evacuee property. But later on the property was declared evacuee property. Rejecting the plea of estoppel, the Court² held:

We are of opinion that the view taken by the House of Lords³ is the correct one and not the one taken by Lord Denning.⁴

The view taken by Lord Denning was as follows:

The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded ... I come therefore to the most difficult question in the case. Is the Minister of Pensions bound by the War Office letter? I think he is.

The views of the House of Lords are expressed thus:

LORD SIMONDS: Mr. Lords, I know of no such principle in our law nor was any authority for it cited. The illegality of an act is the same whether or not

¹A.I.R. 1973 S.C. 2734.

²A.I.R. 1974 S.C. 2325.

³*Howell v. Falmouth Boat Construction Co.* (1951) A.C. 337.

⁴*Robertson v. Minister of Pensions* (1949) 1 K.B. 227.

State of
Kerala v.
Gwalior
Rayons.

Asst. Custodian
v. H.K.
Agarwal.

the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy. I do not doubt that in criminal proceedings it would be a material factor that the actor had been thus misled if knowledge was a necessary element of the offence, and in any case it would have a bearing on the sentence to be imposed. But that is not the question. The question is whether the character of an act done in the face of a statutory prohibition is affected by the fact that it has been induced by a misleading assumption of authority. In my opinion the answer is clearly No. Such an answer may make more difficult the task of a citizen who is anxious to walk the narrow way, but that does not justify a different answer being given.

LORD NORMAND: As I understand this statement, the respondents were in the opinion of the Lord Justice, entitled to say that the Crown was barred by representations made by Mr. Thompson and acted on by them from alleging against them a breach of the statutory Order and further that the respondents were equally entitled to say in a question with the appellant that there had been no breach. But it is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it.

2.13. The appellant was appointed as Vigilance Commissioner which was a temporary post. There was an agreement between the parties that the appellant's term was to be for 5 years from 1 Oct, 3, 1968, or till he attained 60 years, whichever was earlier. The post was abolished in Feb. 1970. One of the contentions raised by the appellant was that the respondent was precluded from altering the terms of the agreement by promissory estoppel. Rejecting the contention, the Court held¹ that appellant knew the post was temporary and that the courts exclude the operation of doctrine of estoppel, when it is found that the authority against whom estoppel is pleaded has owed a duty to the public against whom the estoppel cannot fairly operate, and relied on the following passage:²

As a general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. An exception however arises where it is necessary to prevent fraud or manifest injustice.

2.14. In 1973, the Union of India formulated a scheme for providing incentives to registered exporters of walnuts with a view to offset the losses which exporters would otherwise incur and to augment the foreign exchange earnings of the country. Under the scheme cash assistance was to be given to such exporters upto September 30, 1975. The cash assistance scheme was withdrawn in September 1973, after notice to all concerned and after taking into consideration their representations. Alleging that they had invested considerable sums of money for expanding their business, the petitioners contended that the Government was estopped from going back on their representation. Rejecting the contention, the High Court held:³

It is well known that the sovereign authority like the State has to look after the interest of millions of people and in the present socio-economic set up of the country, it cannot be bound down by an assurance for all times to come where the interest of the public comes into conflict with the assurance once given ... In such cases (when the State performs governmental, public or sovereign functions) the doctrine would not apply when it clashes with the

¹A.I.R. 1973 S.C. 2641 at 2649.

²American Jurisprudence 2nd p. 783, para. 123.

³A.I.R. 1976 J & K 41 at 45-48.

REPORT ON PROMISSORY ESTOPPEL

interest of the public at large, except when it is necessary to prevent fraud or manifest injustice ... If the Government after a review of its policy decision finds that modification or alteration is required in the earlier policy in the interest of the public at large, the Government cannot be debarred from reviewing that policy ... Ours is not a country with unlimited financial resources and the courts of law cannot ignore the fact. The utilisation of the meagre financial resources by the Government therefore, has to be left to the judgment of the Government which is the best judge of the needs of its people. The courts will only bind the Government by its promises to prevent manifest injustice or fraud and will not make the Government a slave of its policy for all times to come when the Government acts in its Governmental, public or sovereign capacity. In its commercial activity the position would, of course, be different. In the present set up of the country, when finances are required for starting and completing various projects in the interest of the public at large, the Government cannot be held bound by a representation made by it, when the need for continuance of the representation is no longer there. The Government must be given a free hand to determine the priorities when on the one hand there are the hungry millions for the larger benefit of whom the money is required by the State, and on the other hand are the affluent few who wish to bind the Government by its promise to make additional profits ... The petitioners do not run the risk of incurring any losses except of course the loss of additional profits.

Excise
Commissioner
v. Ram Kumar.

2.15. In 1969, auctions were held in U.P. for grant of licences to sell country liquor. At the time of the auction no announcement was made that the exemption from sales-tax in respect of sales of country liquor granted under a notification issued in 1959 under s. 4 of the U.P. Sales Tax Act, 1948, would or would not be withdrawn. The respondent in one of the appeals was one of the highest bidders. When the 1959-notification was withdrawn, with the result that his sales became subject to the imposition of sales tax, he contended that the 1959-notification operated as estoppel. Rejecting the contention, the Court observed:¹

It is now well settled by a catena of decisions that there can be no question of estoppel against the government in the exercise of its legislative, sovereign or executive powers.

The Court also relied on the following passage:²

It is too late in the day to urge that the government is just another private litigant, for the purpose of charging it with liability, when it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority ... And this is so even though, as here, the agent himself may have been, unaware of the limitations upon his authority ... 'Men must turn square corners when they deal with the government' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.

Bihar E.G.F.
Coop. Society
v. Sipahi
Singh.

2.16. The fishery rights in a Jalkar were settled with the appellant for the year 1974-75. Since the appellant defaulted in the payment of jamma, the settlement for 1975-76 was made with the respondent, but before he could take

¹A.I.R. 1976 S.C. 2237 at 2241.

²*Federal Crop Insurance Corp. v. Merrill* (1947) 332 US 380.

EVOLUTION OF THE DOCTRINE IN INDIA

possession, the State changed its mind in favour of the appellant. A writ petition by the respondent was allowed by the High Court. Allowing the appeal, the Supreme Court held:¹

It is well settled that there cannot be any estoppel against the Government in exercise of its sovereign legislative and executive functions.

2.17. On October 10, 1968, the respondent released a news item that all new industrial units in the State would be given exemption from sales tax under s. 4A, U.P. Sales Tax Act, 1948, for a period of 3 years from the date of commencement of production. On October 11, the appellant wrote to the Director of Industries stating that in view of the Sales Tax Holiday announced, it would set up a hydrogenation plant and asked for confirmation regarding the exemption. On October 14, the Director replied confirming the news item. On December 12, the appellant's representative met the Chief Secretary of the Government and adviser to the Governor and informed him of the various steps being taken for setting up the plant and the Chief Secretary assured him that the appellant would be entitled to the sales tax holiday. (The State was under President's rule from February 26, 1968 to February 28, 1969, and the new elected Government assumed office on February 27, 1969.) On December 13, the appellant wrote to the Chief Secretary a letter recording the oral assurance given by the Chief Secretary with a request for confirmation. On December 22, the Chief Secretary replied that the respondent would consider the request for exemption on the submission of a formal application. By that time, the appellant had in fact submitted such an application. The financial institutions which were approached by the appellant for financial assistance were not satisfied with the letter of December 22, as it merely stated that the respondent would consider the request for exemption and so, on January 22, 1969, the appellant again wrote to the Chief Secretary for a formal order of exemption. On January 23, the Chief Secretary gave the necessary assurance regarding the exemption. The appellant thereupon went ahead with the setting up of the factory, and on April 25, wrote to the Chief Secretary informing him that the U.P. Finance Corporation had sanctioned financial assistance in view of the assurance given by him. On May 16, the Deputy Secretary to the Government, Industries, wrote to the appellant requesting it to send its representative to a meeting fixed by the Chief Minister to discuss the question of exemption. The appellant replied that exemption had already been granted to it but would however send its representative to the meeting. The appellant's representative attended the meeting and reiterated that exemption had already been granted to the appellant. Thereafter, the appellant proceeded with the work of setting up the factory. On January 20, 1970, the appellant was informed by the respondent that the respondent had taken a policy decision that new vanaspati units which go into production by September 30, would be given partial exemption from sales tax. On June 25, 1970, the appellant wrote to the respondent that it would avail itself of the concession rates. The appellant's factory went into production on July 2. On August 12, another news item appeared that the respondent had decided to rescind even the partial concession. The appellant filed a writ petition for a direction to the respondent to exempt the sales of vanaspathi manufactured by the appellant for a period of 3 years.

The Supreme Court held² that the respondent was bound to exempt the appellant from payment of sales tax in respect of sales of vanaspati for a period of 3 years from the date of commencement of production and was not entitled to

¹A.I.R. 1977 S.C. 2149 at 2154.

²A.I.R. 1979 S.C. 621.

M.P. Sugar
Mills v.
State of
U.P.

REPORT ON PROMISSORY ESTOPPEL

recover such tax from the appellant subject to certain directions regarding the refund of the tax already collected and deposited by the appellant.

For arriving at this decision the Court relied on the doctrine of promissory estoppel after review of the Indian, English and the US laws on the scope of the doctrine. In doing so, the Court laid down the following propositions:

(a) It is true that to allow promissory estoppel to found a cause of action would seriously dilute the principle which requires consideration to support a contractual obligation, but that is no reason why the new principle, which is a child of equity brought into the world with a view to promoting honesty and good faith and bringing law closer to justice, should be held in fetters and not allowed to operate in all its activist magnitude, so that it may fulfil the purpose for which it was conceived and born ... We do not see any reason why promissory estoppel should not be allowed to found a cause of action where, in order to satisfy the equity, it is necessary to do so.

(b) The law may therefore, now be taken to be settled that when the Government makes a promise knowing or intending that it would be acted upon by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required under Art. 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. No distinction can be made between the exercise of a sovereign or governmental function and trading or business activity of the Government, so far as the doctrine of promissory estoppel is concerned.

(c) We do not think that it is necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promise, acting in reliance on the promise, should suffer any detriment.

As regards the first proposition, Bhagwati J., in the instant case and Shah J., in the two cases decided by him, on which Bhagwati J. placed strong reliance, permitted promissory estoppel to be used as a cause of action, Bhagwati J. relied on a judgment of the Court of Appeal¹ for his conclusion that promissory estoppel can be the basis of a cause of action. He noticed that Spenser Bower and Turner² have explained that decision on the basis that it is an application of proprietary estoppel. But Bhagwati J. relied on Lord Scarman's observation that the 'distinction (between promissory estoppel and proprietary estoppel) may indeed be valuable to those who have to teach or explain the law, but I do not think that, in solving the particular problem raised in a particular case, putting the law into categories is of the slightest assistance and said that the decision was not based on any distinctive feature of proprietary estoppel but proceeded on the assumption that there was no distinction between promissory and proprietary estoppel so far as the problem before them was concerned.' (emphasis supplied). And that is exactly the point to be noted. If it was a clear case of promissory estoppel and not proprietary estoppel, would the learned Law Lords have given relief on the basis of estoppel as a cause of action? In fact, Lord Denning with whom Lord Scarman agreed had stated¹ 'there are estoppels and estoppels. Some do give rise to a cause of action. Some don't..... in the species of es-

¹Crabb v. Arun Distt. Council, (1975) 3 All E.R. 865.

²Treatise on the law relating to Estoppel by Representation.

toppel called 'proprietary estoppel' 'it does give rise to a cause of action'. However there is much to be said in his favour when Bhagwati J. asks,

But on what principle, one may ask, is the distinction to be sustained between promissory estoppel and proprietary estoppel in the matter of enforcement by action? If proprietary estoppel can furnish a cause of action, why should promissory estoppel not?

The Law Commission of India recommended as follows.

Great injustice is done sometimes where a promise is made which the promisor knows will be acted upon and which is in fact acted upon and then it is held that such promise is unenforceable on the ground of want of consideration..... We recommend that an exception be added to section 25.

The exception recommended was:

S. 25(4). It is a promise, express or implied, which the promisor knew or should reasonably have known, would be relied upon by the promisee, where the promisee has altered his position to his detriment in reliance on the promise.

The effect of this recommendation is to allow promissory estoppel as a cause of action, though it is not clear whether the result was foreseen. That recommendation has not been so far accepted.

As regards the second proposition laid down by the learned Judge, we feel he has gone too far for the following reasons:

(i) The learned author² on whom Bhagwati J. relied has himself stated thus:

One can easily see why courts and other Judicatory tribunals should not be estopped in the performance of the judicial function, and one can readily see why major governmental policies must be kept within the control of Congress and of the principal policy making officers and why such policies cannot feasibly be subjected to significant alteration by judicially enforced estoppel. But we cannot readily see why the government in its *business and property dealings* should not be subject to the same rules of fairness that courts apply to others engaging in such dealings.

The author was only arguing for similar treatment in business and property dealings and not with respect to governmental functions. This is made clear when he says:

The movement is towards the idea that the government units in their proprietary capacity may be treated like any other party for purposes of estoppel and that even in the governmental capacity estoppel may be applied when the accommodation of the needs of justice to needs of effective government so required.

(ii) It is true that a republic is also governed by law, but a democratic or republican constitution cannot be denied the means for preserving itself; and such means are Revenue. It is for the government to determine its priorities between the hungry millions and the affluent few. In this very vital aspect there is absolutely no parallel or comparison between an individual and the government. As Sri Seervai puts it.³

² Thirteenth Report pp. 7 and 77, (1958).

³ K C Davis, Administrative Law Text (3rd ed., 1972) pp. 343 and 357.

⁴ Constitutional Law of India, 3rd ed. p. 608.

REPORT ON PROMISSORY ESTOPPEL

The reference (By Shah J.) to standards of conduct in a nascent democracy overlooks the fact that public authorities are, and private parties are not, charged with protecting the public interest; and the protection of the public interest must, to that extent, require different standards to be applied to private persons and public authorities.

(iii) When a government changes its policy, it is not right for the court to assume dishonesty or immorality, and throw the burden on the government to satisfy the court that government has acted fairly under compulsion of executive necessity. The burden should be on the party invoking estoppel against the Government to show fraud or manifest injustice. Government acts as honestly is laying down a legal proposition and later on changes its view. If it is argued that it is a different Bench of the Court that generally changes the law, it is also true that change in government policy is often due to a change in the government. In the instant case the original policy of tax holiday was under President's Rule and the withdrawal of the concession was by an elected government. Even otherwise, the same government can and must change its policy if experience shows that such a change is necessary in the public interest. And whether such change is required in the public interest only the government can decide and not a Court. Democratic process, requires changes of policy not only by successive governments but also by the same government. If a government cannot change its policy when there is a change in government it is incomprehensible when it can do so. Judicial enforcement by invoking estoppel against the government will be nothing but trespassing into the legitimate field of activity of another limb of the government and would be nothing short of interfering with the democratic process.

(iv) Bhagwati J. has excluded the legislature from the operation of the doctrine. The reason can only be because there is an irrebuttable presumption that the legislature acts in public interest because it knows the public needs. Does not a similar presumption apply in the case of the executive? The utmost one can say is that it may be a case of rebuttable presumption if the person who invokes the doctrine against the government establishes fraud or manifest injustice.

(v) In the *Gwalior Rayon* case, the Court has exempted the legislature from the doctrine and Bhagwati J. accepts it. In *N. Ramanatha's* case, the Court has held that estoppel cannot be pleaded against an authority which owes a duty to the public. In *Ramkumar's* case the Court held that there can be no question of estoppel against the government in the exercise of its legislative, executive and sovereign functions. In the case of such unanimous views especially of larger Benches of five Judges judicial comity requires that a Bench of two Judges should not have followed the judgements in the *Anglo-Afghan* case and the *Century Spg. and Mfg. Co. case*. These are Judgements of three Judges and the reference to promissory estoppel by Shah J. in the first case was merely *obiter*. Bhagwati J. distinguished *Ramanatha* saying that the petitioner knew that the post was temporary. But then are not all governmental policies subject to change? He also agreed with *Ramanatha* where it is stated, 'where a government does a duty to the public to act differently, promissory estoppel cannot be invoked to prevent government from doing so,' but interpreted 'duty to public' to mean 'a course of conduct enjoined by law.' No law imposed a duty on the government to abolish a post in *Ramanatha*. And what is more government always owes a duty to the public and not, only when it is enjoined by law'. The reasons why *Ramkumar* did not refer to *Anglo-Afghan*, *Century Spg. and Mfg. Co.* and *Turner Morrison* cases, are, the reference to promissory estoppel in the first was *obiter*; the second was wrong because it dealt with legislative power, and the third was between private parties.

Bhagwati J. relies on *Malhotra* for saying that that decision shows that estoppel can be invoked against the government. But *Malhotra* says.

The doctrine of estoppel in its application to the State has undergone some radical thinking since the judgment in the *Anglo-Afghan* and *Century Spg. cases*.

As already stated the reference to promissory estoppel by *Shah J.* in *Anglo-Afghan* is *obiter* and the same Judge's reliance on the doctrine in *Century Spg.* case is clearly wrong even according to *Bhagwati J.*'s view because, the municipality's decision to impose octroi duty is the exercise of legislative power.

(vi) Lastly, many legal eyebrows in the U.K. and the U.S. are bound to be lifted at this proposition, because, in those countries there has never been any controversy arising from a government changing its policy.

In an interesting English case in 1972, the plaintiffs were granted an air transport licence by the Civil Aviation Authority for low cost passenger service to run what was called a 'Skytrain', for 10 years from 1973. The plaintiffs spent large sums of money as operation costs, but in 1975, there was a change of policy due to a change in the government, and the licence was cancelled in 1975. The challenge to the cancellation was successful on the ground that the new policy was *ultra vires* the powers of the Secretary of State. But on the question of estoppel the following views were expressed:

Lord Denning: The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by Common law, when it is doing so in the proper exercise of its duty to act for the public good, even though, this may work some injustice or unfairness to a private individual..... It can however be estopped when it is not properly exercising its powers but is misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public.

In the present case, if the Secretary of State did have a prerogative to withdraw the resignation, and properly exercised the prerogative, then there would be no case for estoppel. He would be exercising the prerogative for the public good and would be entitled to do it, even though it did work injustice to some individuals.

Lord Roskill pointed out that when a party comes into power, it generally makes a change in policy an election issue and observed:

The doctrine of estoppel cannot be allowed to hinder the formation of government policy—or one might add the constitutional result of a general election.

Whatever representations the Secretary of State in office between 1972 and 1974 may have made to the plaintiffs he made them pursuant to his public duty and in good faith. If in 1976 his successor was of the opinion that the public interest required him to go back on those representations, he was in duty bound to go back on them. The fact that Laker Airways suffered loss as a result of the change is unfortunate; they have been the victims of a change of government policy. This often happens. Estoppel cannot be allowed to hinder the formation of government policy.

REPORT ON PROMISSORY ESTOPPEL

In the U.S. academic discussion has centered round two cases.¹ Neither of these cases had anything to do with changes in governmental policy. In the first case, the U.S. Supreme Court had categorically stated that even in business matters there is a difference between government and private individuals.

In both these countries, which continue to be a source for our law, the controversy is how far government is bound by the representations of its officials.

As regards the third proposition of Bhagwati J. we feel that here also the learned Judge has gone a bit too far in not requiring detriment to be established. After all the principle is one of equity and no question of equity can ever arise unless someone is hurt. That is, unless the person to whom the representation is made would be unjustly harmed if the rule of equity is not invoked.

On this question of detriment to the person to whom the representation is made, there are two views. One view is that the more 'acting upon' the representation by the person to whom the representation is made is itself 'detriment' suffered by such person. The other view is that the person who acted upon the representation, would suffer some injustice, if the person who made the representation is allowed to resile from what he stated. The two views are lucidly explained by Dixon J. as follows :

The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong, and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice.²

Spencer Bower and Turner³ have examined these two views critically and stated :

¹*Federal Crop. Ins. Corp. v. Merrill* 332 US 380 and US (1951) 341 US 41.

²*Grundt v. Great Boulder Pty. Gold Mines Ltd.* (1938) 59 C.L.R. 641.

³*The Law Relating to Estoppel by Representation* (3rd ed, pp. 391-394).

Notwithstanding general agreement by high authority that there must be an alteration in the position of the promisee in reliance on the promise, it has been seriously argued that it is not necessary that such an alteration of position should amount to "detriment". Lord Denning is the principal protagonist for this proposition...If the meaning of "detriment", where that light is used in the estoppel cases, be subjected to precise examination in the light of the discussion of it from the pen of Dixon J., it is clear that detriment means injustice to the promisee which would result if the promisor were allowed to recede from his promise. This definition will be found to resolve the difficulties between the two schools of thought in many of the actual cases.....But all this notwithstanding, there may possibly remain some cases in which it will be impossible to maintain that any detriment resulted, and yet it can still be said that the promisee has "acted on" the promise. It is difficult perhaps to imagine such cases which would qualify in all other requirements as promissory estoppel cases...But if and when a case arises to be determined by a Court of the highest authority in which it is found as a fact that the promisee, while "acting on" the promise has not done so to his detriment within the extended meaning which Dixon J. gives to the term, it will become necessary to decide whether "acting on" without "detriment" is sufficient. It is here submitted that in promissory estoppel, as in orthodox estoppel, detriment in Dixon J.'s sense, will be found essential; for to go further must go perilously close to the enforcement of a simple gratuitous promise."

We are inclined to accept the views of the learned authors and to require 'detriment'—as explained above—as a necessary element of the doctrine of Promissory Estoppel. In fact the *M. P. Sugar Mills* case is the wrong case in which Justice Bhagwati has taken up arms. In this case there was a change of government, the representation of the Chief Secretary was beyond his authority, because an exemption from sales tax could be granted only under s. 4A of the Act; and the petitioner had not and would not suffer any loss. When sales tax is imposed it will be passed on to the consumer and no monetary loss at all would be inflicted on the petitioner.

2.18 On the establishing of a mandi the concerned Municipal Committee decided that purchasers of the plots for sale in the mandi would not be required to pay octroi duty on goods imported within the mandi. This was in 1918 and the state of affairs continued till 1965. During that time though the Municipal Committee had changed its mind the Government approved the Committee's original action of exempting the purchasers of plots from octroi duty. In 1965, on the request of the Municipal Committee, the Government withdrew its approval of the earlier action and the Municipal Committee started levying octroi duty. A challenge to this action of the Municipal Committee and the Government failed in the High Court. Dismissing the appeal, the Supreme Court held :¹

Jit Ram V. State
of Haryana

So far as the recommendation of the Municipal Committee to the Government to levy octroi duty is concerned, though it is contrary to the representation it made to the buyers of the sites in the mandi, the Municipality is not estopped as the representation made by it was beyond the scope of its authority. The levy of tax being for a public purpose i.e. for augmenting the revenues of the Municipality as laid down in *Ramkumar's case*, (AIR 1976 SC/2237) the plea of estoppel is not available. The order of the Government directing the levy of octroi in pursuance of the resolutions of the Municipality cannot also be challenged as it is in the exercise of its statutory duty.

¹A.I.R. 1980 S.C. 1285.

REPORT ON PROMISSORY ESTOPPEL

In the course of the judgement the learned Judges laid down the following propositions regarding promissory estoppel:

(1) The plea of promissory estoppel is not available against the exercise the legislative functions of the State:

(2) The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.

(3) When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of *ultra vires* will come into operation and the Government cannot be held bound by the unauthorised acts its officers.

(4) When the officer acts within the scope of his authority under a scheme and enters an agreement and makes a representation and a person acting on the representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position. The Court can enforce compliance by a public authority or the obligation laid on him if he arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government.

(5) The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange or other matters which have a bearing on the general interest of the State.

CHAPTER 3

THE LAW IN THE UNITED KINGDOM AND THE UNITED STATES

United
Kingdom.

3.1. The law in the United Kingdom is stated succinctly in text books¹ as follows:

SNELL: *Promissory estoppel*: Where by his words or conduct one party to a transaction makes to the other a promise or assurance which is intended to affect the legal relations between them, and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.

Like estoppel at common law, promissory estoppel may provide a defence, but it can create no cause of action.

The difference between it and proprietary estoppel is that the effect of promissory estoppel may be only temporary whereas that of proprietary estoppel is not only permanent but is also capable of operating positively so as to confer a right of action.

HANBURY: *Promissory estoppel*: Where, by words or conduct a person makes an unambiguous representation as to his future conduct, intending the re-

¹Snell, *Principles of Equity*, 26th ed. (1966) pp. 625 to 631. Hanbury, *Modern Equity*, 11th ed. (1981) pp. 735 to 739.

EVOLUTION OF THE DOCTRINE IN INDIA

presentation to be relied on and to affect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.

Promissory estoppel contains a number of features which distinguish it from estoppel by representation of fact. First, in that the representation may be one of intention and not one of fact; which raises the question whether it is inconsistent with the House of Lords decision in *Jordan v. Money*.¹ But the doctrine is now well established. Secondly, the requirement of detriment to the representee is less stringent in the case of promissory estoppel. Financial loss or other detriment is of course sufficient; but it seems that it is not necessary to show more than that the representee committed himself to a particular course of action as a result of the representation. Thirdly, the effect of the estoppel may not be permanent. The representor may escape from the burden of the equity if he can ensure that the representee will not be prejudiced. But, consistently with estoppel by representation, promissory estoppel does not create a cause of action; it operates to give a negative protection. It is a shield and not a sword.

Proprietary estoppel: This doctrine is applicable where one party knowingly encourages another to act, or acquiesces in the other's actions, to his detriment and in infringement of the first party's rights. A doctrine, based on encouragement and acquiescence, under which a court of equity will adjust the rights of the parties so as to do substantial justice between them.

3.2. In the United States the law is stated as follows:

United
States.

Restatement:² A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise.

American Jurisprudence: There is considerable dispute as to the application of estoppel with respect to the State. While it is said that equitable estoppel will be invoked against the State when justified by the facts, clearly the doctrine of estoppel should not be lightly invoked against the State. Generally State is not subject to an estoppel to the same extent as is an individual, or a private corporation. Otherwise it might be rendered helpless to assert its powers in government. Therefore, as a general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. An exception, however, arises in the application of estoppel to the State when it is necessary to prevent fraud or manifest injustice.

CHAPTER 4

THE PROBLEMS

4.1. We are now in a position to state the problems arising out of the earlier Problems discussion. They are:

- (a) Should promissory estoppel be allowed to be used as a cause of action?
- (b) Could the doctrine be used against the government and if so when?
and
- (c) Should the promisee suffer detriment before he can invoke the doctrine?

¹(1854) 5 H.L.C. 185.

²Article 90, American Law Institute's Restatement of the law of Contracts.

³Vol. 28, p. 783, para. 123.

These problems arise because,¹ in all systems of civilised administration, citizens expect the concerned departments and agencies to act in conformity with the procedure they have established for themselves or promises they have made. Departure from that procedure or promise, be it a mere rule of practice, frustrates legitimate expectations, and the citizens turn to the courts for redress against arbitrary action. The courts will then have to decide whether the procedure or promise in question is enforceable against the body that has adopted or made it. To what extent can the private law principle that persons could be held to representations made by them and acted upon by others to their detriment, be applied against such bodies? One view is that a public body entrusted with powers and duties for public purposes cannot divest themselves of these powers and duties by entering into contracts or making representations incompatible with the discharge of the power and duties. If a departmental official makes a representation which is relied on by a private party to his injury, the department can still go back on the representations because that may be necessary in the public interest. Another view is that the department can be held to the representation, unless it is shown to the satisfaction of the court that a departure will be justified by overriding considerations of public interest.

Views of
the Law
Commis-
sion.

4.2 Our views are as follows:

(a) In view of the recommendation already made in the Thirteenth Report of the Law Commission, promissory estoppel may be allowed to be used as cause of action.

(b) The doctrine can be used against the government in its business and property activities. The position in this area is not similar to that of tortious liability where the distinction unfortunately is perpetuated by the courts themselves. To invoke the doctrine of promissory estoppel against the government in its governmental activities would be making the government and its agencies (public bodies) ineffective, and, therefore, it is that we are recognising this dichotomy in this field.

(c) On this aspect we are of the view that there should be detriment in the sense explained by Mr. Justice Dixon above, that is, the person to whom the representation or promise is made, is likely to suffer some damage or loss if the person making the representation or promise is allowed to go back on his representation or promise.

CHAPTER 5 COMMENTS RECEIVED

5.1. The Law Commission has issued a working paper on the aforesaid aspects and the following comments were received. The commission is grateful for the response.

5.2. The High Courts² had no comments to offer'. The Law Departments of three State Governments³ agreed with the proposed amendments. The Incorporated Law Society of Calcutta⁴ had suggested the incorporation of cl. (d) in the proposed sub. sec. (3) of sec. 25A that where the promisor is the Government, the promise should have been made by an authorised officer of the Government. The Society also indicated that a sub. sec. (4) may be added that the doctrine of promissory estoppel shall not be available in any other case except those provided for. When the Government is the promisor, the promise is deemed to be made by a competent officer on behalf of the Gov-

¹(1983) K.L.T. 1083, 1089 (Govindan v. Cochin Shipyard).

²Law Commission File No. 2(2)/84-L.C. S1. No. 3(R).

³Law Commission File No. 2(2)/84-L.C. S1. No. 7(R).

⁴Law Commission File No. 2(2)/84-L.C. S1. No. 5(R).

RECOMMENDATIONS

ernment. Hence, the Law Commission is not recommending that such a provision should be made.

5.3. The Law Commission has given full consideration to the views expressed. The Law Commission accordingly makes recommendations set out in Chapter 6.

CHAPTER 6

RECOMMENDATIONS

Recommendations of the Law Commission.

6.1 It is suggested that since the doctrine of promissory estoppel is a beneficial doctrine based on equity, exclusion of its operation may be allowed only where absolutely necessary. The proper course would be to hold the government bound by its promise which has been acted upon by the other party (promisee) subject to certain narrowly drawn exceptions. We are not recommending the test of 'sovereign' and 'non-sovereign' functions, because, it is not an easy test to apply. Our recommendation is that a new section may be inserted in the Indian Contract Act after s. 25 as suggested below.

Suggested Section 25A, Contract Act

Promissory estoppel.

6.2. 25A. (1) Where

(a) a person has, by his words or conduct made to another person, an unequivocal promise which is intended to create legal relations or to affect a legal relationship to arise in the future; and

(b) such person knows or intends that the promise would be acted upon by the person to whom it is made : and

(c) the promise is, in fact, so acted upon by the other person, by altering his position, then, notwithstanding that the promise is without consideration, it shall be binding on the person making it, if, having regard to the dealings which have taken place between the parties, it would be unjust not to hold him to be so bound.

(2) The provisions of this section apply whether or not there is a pre-existing relationship between the parties.

(3) The provisions of this section shall not apply:—

(a) Where the events that have subsequently happened show that it would be unjust to hold the promisor to be bound by the promise; or,

(b) Where the promisor is the Government and the public interest would suffer if the Government is held to be bound by the promise; or,

(c) Where the promisor is the Government, and enforcing the promise would be inconsistent with an obligation or liability imposed on the Government by law.

Explanation (1).—Where a question arises whether public interest could suffer within the meaning of Clause (b), the court shall have regard to the amount of harm likely to be caused to the promisee if the promise is not enforced and the extent of injury to be caused to the public interest if the promise is enforced, and shall decide the matter on a balance of the two considerations.

Explanation (2).—In this section 'Government' includes all public bodies.

(K.K. MATHEW)
CHAIRMAN

(J.P. CHATURVEDI)
MEMBER

(DR. M.B. RAO)
MEMBER

(P.M. BAKSHI)
PART-TIME MEMBER

(VEPA P. SARATHI)
PART-TIME MEMBER

(A.K. SRINIVASAMURTHY)
MEMBER-SECRETARY

DATED : 12th December, 1984.